

EXHIBIT 13

1 STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY
2 BRANCH 1

3
4 STATE OF WISCONSIN,
5 PLAINTIFF, JUDGE'S DECISION
6 vs. Case No. 05 CF 381
7 STEVEN A. AVERY,
8 DEFENDANT.

9 DATE: AUGUST 22, 2006

10 BEFORE: Hon. Patrick L. Willis
11 Circuit Court Judge

12 APPEARANCES:

13 KENNETH R. KRATZ
14 Special Prosecutor
On behalf of the State of Wisconsin.

15 THOMAS J. FALLON
16 Special Prosecutor
On behalf of the State of Wisconsin.

17 DEAN A. STRANG
Attorney at Law
On behalf of the Defendant.

18 JEROME F. BUTING
19 Attorney at Law
On behalf of the Defendant.

20 STEVEN A. AVERY
21 Defendant
22 Appeared in person.

23 * * * * *
TRANSCRIPT OF PROCEEDINGS

24 Reported by Diane Tesheneck, RPR
25 Official Court Reporter

1

CF 1 THE COURT: At this time the Court calls
2 State of Wisconsin vs. Steven Avery, Case No. 05
3 381. Will the parties present state their
4 appearances for the record, please.

appears 5 ATTORNEY KRATZ: State of Wisconsin
6 by Calumet County District Attorney Ken Kratz,
as 7 appearing as Special Prosecutor. Also appearing
8 Special Prosecutor is Tom Fallon, from the
9 Department of Justice.

in 10 ATTORNEY STRANG: Steven Avery is here
11 person and he's represented by Jerry Buting of
12 Buting and Williams. And Dean Strang of Hurley,
13 Burish and Stanton. Good morning.

14 THE COURT: All right. We're here this
15 morning for the Court to issue its decision on a

16 number of motions that have been filed.
Following
17 the decisions on those motions, the Court will
take
18 a summary of the motions that are still
outstanding,
19 just to make sure that they are all being dealt
20 with.

21 Court will first issue its decision on
22 the defendant's motion to dismiss on the grounds
23 that the State has made a trial in Manitowoc
24 County impossible. The basis for this motion is
25 alleged that the State has taken actions to make

1 a fair trial in Manitowoc County impossible.
2 Specifically, the defendant refers to
3 eight press conferences that were conducted
4 primarily by the Calumet County District Attorney
5 and Sheriff. Four of these press conferences
6 occurred after the defendant's arrest in this
7 case. The defendant also cites comments made in
8 a two-part news story in May of this year by the

9 Manitowoc County Sheriff.

10 The defendant asserts that his
11 constitutional rights under Article 1, Section 7,
12 of the Wisconsin Constitution, as well as his due
13 process rights under the Fourteenth Amendment to
14 the United States Constitution, and Article 1,
15 Section 8, of the Wisconsin Constitution were
16 violated by the State's participation in
17 pre-trial publicity.

18 The defense brief concludes on Page 11,
19 that, taken together, the State's actions
20 effectively have destroyed Avery's opportunity to
21 obtain an impartial jury in Manitowoc County.
22 That is, the basis for requesting dismissal as a
23 sanction is the claim that participation by
24 agents of the State in pre-trial publicity has
25 precluded the defendant from receiving a fair

1 trial in front of Manitowoc County jurors. The
2 Court has reviewed the media account -- accounts
3 referenced by the motion.

4 The defendant cites no Wisconsin case
5 which has ever granted the remedy he requests;
6 that is, no Wisconsin case has ever found that a
7 defendant is entitled to dismissal of a criminal
8 charge because of the State's participation in
9 pre-trial publicity.

10 The defendant does cite two Wisconsin
11 cases as being relevant: State ex rel. Schulter
12 v. Roraff, a 1968 Wisconsin Supreme Court case,
13 and Briggs vs. State, a 1977 Wisconsin Supreme
14 Court case.

15 In neither of these cases did the Court
16 order that the criminal charges involved be
17 dismissed. In fact, the Court specifically
18 rejected the remedy in Schulter, the one case in
19 which the defendant actually requested dismissal.
20 Continuance and change of venue have been the
21 only remedies approved, to date, where
22 prejudicial pre-trial publicity threatens the
23 defendant's right to a fair trial.

24 The Court is not prepared to say that
25 the State's participation in pre-trial publicity

1 could never justify dismissal of criminal
2 charges; indeed, there's language from the
3 Schulter decision which suggests that the Court
4 did not rule out the possibility entirely.
5 There's a sentence that reads as follows: In
6 State vs. Woodington, we considered the problem
7 of pre-trial publicity and concluded that the
8 remedy was not necessarily the dismissal of
9 charges, but a change of venue, or continuance of
10 the trial, and the careful selection of the jury
11 on voir dire.

12 So it may be possible that, in an
13 appropriate case, the Supreme Court could justify
14 dismissal as a sanction. However, since no
15 reported decision ever -- ever sanctioned the
16 remedy of dismissal, this Court concludes that a
17 remedy as drastic as dismissal could only be
18 justified by very egregious behavior on the part
19 of the State.

20 The Court concludes in this case that
21 the State's role in pre-trial publicity was not
22 egregious, or designed to jeopardize the

23 defendant's right to a fair trial. The Court has
24 reviewed the participation of the State
25 complained of by the defendant and makes the

5

1 following observations:

2 The first four of the eight cited press
3 conferences were more informational in nature and
4 also related more to the missing person report,
5 not to the involvement of the defendant in the
6 crimes that have been alleged in this case. The
7 last four press conferences did involve a
8 detailing of the accusations made against the
9 defendant, in some cases with more detail than
10 the Court believes was necessary.

11 But the content was largely confined to
12 information contained in the Complaints against
13 Mr. Avery, and the co-defendant in this case,
14 Brendan Dassey. While the content was somewhat
15 inflammatory in nature by virtue of the very
16 allegations of fact, similar to the situation
17 described in the Briggs decision, the information

18 was largely available to the press and the public
19 anyway, from the Complaints, which already were,
20 or were soon to become, public information.

21 The Court notes that the press in this
22 case has given publicity to a number of pleadings
23 and motions that have been filed, even before the
24 court proceedings dealing with those pleadings.
25 So, it is unlikely that the news conferences

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1 resulted in the disclosure of any meaningful
2 information that would not have been publicized
3 in any event.

4 The Court also notes that, especially
5 early in these proceedings, there were media
6 reports that the defendant and members of the
7 defendant's family believed the police were
8 unfairly picking on him and suggested that the
9 defendant was being framed; indeed, the defense
10 in this case has filed motions indicating that
11 such a defense may be pursued at trial.

12 Supreme Court Rule 20:3.6(d) permits a
13 district attorney to make a statement reasonably
14 required to protect the State from the adverse
15 effects of publicity not initiated by the State.
16 Early in these proceedings, such adverse
17 publicity existed. The State was reasonably
18 entitled to respond to public allegations that it
19 was basing its decisions on bias rather than the
20 evidence obtained.

21 With respect to the two-part news story
22 involving the Manitowoc County Sheriff, the Court
23 notes that that took place in May, a number of
24 months before the scheduled trial date. At the
25 outset, the Court does conclude that a number of

1 the comments made by the Sheriff were ill-advised
2 and the Sheriff should not have participated in
3 the interview, even in the absence of a
4 prohibition order issued by the Court. The Court
5 does conclude, however, that his participation
6 was not so egregious or prejudicial as to justify

7 dismissal of the charges.

8 First, it had been previously reported,
9 and the May reports reiterated, that the Sheriff
10 was involved in the wrongful prosecution of
11 Mr. Avery back in 1985. The Sheriff's testimony
12 at the July 5 hearing in this case suggested he
13 may still not be convinced that Gregory Allen is
14 guilty and Steven Avery is innocent in the 1985
15 sex assault. But the Sheriff appears to be
16 largely alone in that belief.

17 As has been widely reported for some
18 time, the State has not only conceded that
19 Mr. Avery did not commit the 1985 crime, but the
20 State has concluded that another man, Gregory
21 Allen, did. Thus, any viewer of this report
22 would have serious reason to question the
23 Sheriff's objectivity.

24 To further balance the report, it
25 included prior statements from members of the

1 defendant's family that law enforcement
2 representatives were unfairly picking on the
3 defendant's family.

4 Sheriff's explanation as to why his
5 department would have had no reason to frame the
6 defendant may have been unfortunately worded, but
7 the Court is satisfied that the Sheriff was
8 trying to explain, in an admittedly awkward way,
9 why the allegation that his department was trying
10 to frame Steven Avery should not be believed. As
11 the Court has already noted, while the Sheriff
12 should not have granted the interview, his
13 participation is somewhat mitigated by a
14 perceived need to respond to publicized frame-up
15 allegations on the part of the defendant and his
16 family.

17 A person viewing the report may well
18 have come away with the impression that the
19 Sheriff believed the defendant is guilty of the
20 crimes charged in this case. That should not be
21 any more surprising than that the defendant's
22 family, friends, and his attorney in a civil
23 case, Stephen Glynn, publicly expressed their
24 belief in his innocence in the same report.

25 If law enforcement officials did not

1 believe the defendant was guilty, this Court
2 would certainly expect the State to move to
3 dismiss the charges against the defendant. The
4 Court gives the public more credit than to be too
5 unduly influenced by comments from either side.
6 The report was balanced and not so inflammatory
7 that persons who viewed it months ago could still
8 not provide the defendant a fair trial if
9 selected as jurors.

10 Finally, the Court notes that while the
11 defense is requesting dismissal because he
12 asserts the State's participation in pre-trial
13 publicity has made a trial in Manitowoc County
14 impossible, the defendant acknowledges in another
15 motion that if the Court grants an adjournment of
16 the trial date to early next year, a fair jury
17 composed of Manitowoc County citizens could be
18 selected. At least, the Court believes that's a
19 fair inference for the Court to draw from the
20 defendant's contingent change of venue request.

21 The bottom line is that while there may
22 be a set of facts which would warrant the relief
23 the defendant seeks, there are no such facts
24 present here. The complained of publicity
25 occurred many months before the scheduled trial.

10

1 Early news conferences focused on the search for
2 Teresa Halbach, not the charges against the
3 defendant.

4 Later press conferences with the Calumet
5 County District Attorney and Sheriff were mainly
6 confined to information available in public
7 records. The Manitowoc County Sheriff's
8 participation in the May interview was
9 ill-advised, but not so prejudicial as to justify
10 the remedy the defendant seeks.

11 The defendant's own contingent change of
12 venue request demonstrates his belief that, with
13 adequate precautions, a fair jury can be selected
14 in Manitowoc County. For all these reasons, the

15 defendant's motion to dismiss is denied by the
16 Court.

17 Before I proceed to other motions, I
18 will note that there have been motions filed
19 relating to change of venue and scheduling of the
20 trial date. And it's my understanding that the
21 parties have a stipulation on those issues to
22 propose to the Court this morning; in fact, I
23 have been handed a written stipulation. Counsel,
24 does one of you care to put it on the record for
25 the Court?

11

I 1 ATTORNEY KRATZ: I certainly can, Judge.
to 2 don't know how much in detail the Court wants me
3 go. We have provided the Court a two-page
with 4 stipulation. That stipulation attempts to deal
5 the issues of change of venue, as well as trial
6 schedule. The stipulation, and I will read at
least 7 the part of the stipulation that is being

proposed

8 towards the bottom of Page 1.

9 The parties, that is, the defense and
10 the State, have agreed to the following: Number
11 one, that the jury trial in this case will
12 commence on or about February 5, 2007. The
13 parties continue to believe that the trial itself
14 will last approximately six weeks. I note for
15 the record that I'm paraphrasing, when
16 appropriate, in parts of the stipulation.

17 Number two, that the jury trial will
18 physically be held in the Calumet County
19 Courthouse.

20 Number three, that the Court has agreed
21 upon the county in which the jury will be
22 selected. The parties have identified and have
23 agreed upon that jury pool, and the Court may
24 wish to comment on that thereafter.

25 The stipulation is proposed by myself

12

1 and Mr. Strang, both as lead counsel for the

2 relative parties. The stipulation includes
3 acquiescence by Mr. Avery, and a statement as to
4 waiver of right to be tried physically here in
5 Calumet County. And also includes the agreement
6 of the Halbach family, by Tim Halbach, a
7 representative of the Halbach family.

8 I should note that the purpose of the
9 stipulation, or at least in part, as well as the
10 Halbach's acquiescence, is based upon the Halbach
11 family's ability to now fully participate, if
12 they choose, in all aspects of the jury trial, as
13 the physical location would be within Calumet
14 County.

15 Attached to the stipulation includes
16 proposals from Sheriff Pagel, with the agreement
17 of the Manitowoc County Sheriff's Department.
18 This sets forth reasons why Calumet County is a
19 preferred venue, or preferred place of trial in
20 this case, as to issues of security, transport,
21 and the physical evidence which is being held in
22 the Calumet County Courthouse.

23 Lastly, there is correspondence from
24 Mr. Rollins, who is Corporation Counsel, acting
25 on behalf of Manitowoc County. This county, that

1 is, Manitowoc County, has requested this Court
2 adopt the stipulation, based upon the physical
3 amenities that the Calumet County Courthouse may
4 have, Mr. Avery's location, the physical
5 evidence, again, and the participation of the
6 Halbach family.

7 For all of those reasons, and reasons
8 previously provided in more detail to the Court,
9 including this proposal having been made by me
10 back in, I believe it was February of this year,
11 the parties jointly, that is, Mr. Avery, his
12 lawyers, and the State, is asking the Court adopt
13 the stipulation.

14 THE COURT: Mr. Strang.

15 ATTORNEY BUTING: Counsel recited the
16 stipulation's terms, in their essence. He did it
17 fairly. He did it accurately, but for one small
18 item on which he misspoke, innocently, and that

is

19 simply that Mr. Avery has agreed in writing here,
20 not to be tried in Manitowoc County, physically.

it 21 The trial will take place in Calumet County, but
to 22 would be Manitowoc County in which he had a right
And 23 insist upon the physical location of the trial.
Calumet 24 he's agreed instead to try the case in the
25 County Courthouse, just as counsel explained.

14

there 1 THE COURT: All right. I will note
2 were some written modifications to the third
parties 3 paragraph in the stipulation, that after the
4 approached the Court, I indicated I had a concern
5 with. At one point, it was my understanding the
would 6 parties wished the county from which the jury
But I 7 be selected to not be disclosed at this time.
8 understand the parties do not have an objection
to 9 disclosure as of today.
10 ATTORNEY KRATZ: That's correct, Judge.

11 THE COURT: Mr. Strang.
12 ATTORNEY STRANG: That's true.
13 THE COURT: And I think that is
important,
I'm 14 for the Court to make sure that Mr. Avery -- and
15 going to conduct a brief colloquy with him on the
16 record today -- that everybody understands and
17 agrees what is being proposed here and,
the 18 specifically, that the parties both agree that
Is 19 jurors are to be selected from Manitowoc County.
20 that correct?
21 ATTORNEY STRANG: Yes.
22 ATTORNEY KRATZ: Yes.
23 THE COURT: Mr. Avery, is that your
24 understanding of the recommendation that the
parties 25 are proposing to the Court today, and that you
have

15

1 agreed to?

2 MR. AVERY: Yes.

3 THE COURT: Okay. I do have some
questions
4 to ask of you, to make sure that you understand
it,
5 and I want to make sure that you are knowingly
6 agreeing to this proposal.

7 First of all, do you understand that you
8 have a constitutional and statutory right to keep
9 venue in Manitowoc County, if you wish; that is,
10 a right to be tried not only by a jury of
11 Manitowoc County residents, but also, at least
12 arguably, to a trial physically held in Manitowoc
13 County? Do you understand that?

14 MR. AVERY: Yes, I do.

15 THE COURT: Do you also understand that
the
16 venue statute, Section 971.225, only permits the
17 Court to order the trial to be held in another
18 county if I make a determination that an
impartial
19 trial could not be held in Manitowoc County?
That
20 is, if you were not requesting it, the Court
would
21 not be ordering that this trial be held in
Calumet
22 County; do you understand that?

23 MR. AVERY: Yes.

in 24 THE COURT: Is it your wish to be tried
of 25 Calumet County in this case, with a jury composed

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1 Manitowoc County residents?
2 MR. AVERY: Yes.
3 THE COURT: Has anyone made any promises
or 4 threats to you, to get you to request this
5 provision?
6 MR. AVERY: No.
7 THE COURT: Have you had adequate time
to 8 discuss this decision with your attorneys?
9 MR. AVERY: Yes.
10 THE COURT: And do you have any
questions 11 at this time? If you do, I would go off the
record 12 and permit you to discuss the matter further with
13 your attorneys. Do you have any such questions?
14 MR. AVERY: No, I don't.

15 THE COURT: Very well. The parties had
16 alerted the Court a few days ago that this
17 stipulation would be being presented today, so I
18 have had some time to give it some thought. I
also
19 took the opportunity, a few days ago, to travel
to
20 Calumet County in order to tour the courthouse
21 facilities.

22 I agree that there are some advantages
23 to holding the trial in Calumet County, in terms
24 of security relating to both the defendant and to
25 the jurors. There also appears to be more space

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1 at the courthouse for the media.

2 And the Court has been informed that
3 Manitowoc County officials believe it would be
4 more economical to hold the case in Calumet
5 County. That is not a major request, obviously,
6 in the Court's decision, but the Court is aware
7 that Manitowoc County officials concur in the
8 move. And I also understand that the victim's

9 family has joined in this request; in fact,
10 Calumet County, I believe, is closer to their
11 home than Manitowoc.

12 Based on those considerations, the
13 request that's been made by the parties, I'm
14 going to grant the joint request that's been made
15 here. I will also note the request calls for a
16 delay in the trial date, that will further
17 alleviate any prejudicial effects of any
18 pre-trial publicity, avoid any potential
19 conflicts with the Thanksgiving holiday that
20 might have occurred had the trial started in
21 mid-October, and allow the defense more time to
22 evaluate the evidence in this case, which is
23 somewhat voluminous. The Court has been informed
24 of such requests on the defense in the past. So
25 I will grant the request.

18

1 The trial date here will be scheduled
2 for February 5, of 2007. I cannot foresee

3 anything at this time that would result in a
4 further continuance of that trial date, and the
5 Court will agree to hold the trial in the Calumet
6 County Courthouse.

7 The jury will be selected, composed of
8 Manitowoc's residents. Jury selection, I think,
9 will take place here. It will be more convenient
10 for everyone. But once the trial begins, it will
11 take place in Calumet County. Is there anything
12 further from either party on that matter?

13 ATTORNEY KRATZ: No, Judge.

14 THE COURT: If not, then the Court will
15 move on to the defense motion to exclude members

of

16 the Manitowoc County Sheriff's Department from
17 testifying in this case. That motion initially
18 included a request, also, to prevent members of

the

19 Sheriff's Department from overseeing the jury in
20 this case. But, Mr. Strang, it's my

understanding

21 that with the move of the physical site of the
22 to Calumet County, that portion of the defense
23 motion is being withdrawn.

trial

24 ATTORNEY STRANG: It is in the sense

that I

25 think it's mooted. There are a number of

logistical

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to 1 details attending the stipulation just presented
2 the Court, and adopted by the Court, that we have
3 not laid out here today, but on which the parties
4 are in accord. And one of those, in sum, is that
5 with a trial conducted in the Calumet County
6 Courthouse, the Calumet County Sheriff's
Department,
7 in the ordinary course, would take charge of jury
8 assembly, jury management, the role of bailiff,
9 custody of Mr. Avery, if in fact he's in custody
at
10 the time of trial.

11 And we see that as mooted the request
12 for relief as to a role with the Manitowoc County
13 Sheriff's Department, in prospective or actual
14 jurors, because under this proposal the Manitowoc
15 County Sheriff's Department will have no role
16 with, or contact with, actual or prospective
17 jurors.

Court 18 THE COURT: Okay. All right. As the
all 19 noted, the defense has filed a motion to exclude
Department 20 members of the Manitowoc County Sheriff's
of 21 from testifying on behalf of the State, as part
22 the State's case-in-chief.
23 The sole basis for the defense motion
24 arises out of comments made in an interview
25 Sheriff Kenneth Peterson provided to FOX 11 News

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1 in Green Bay, portions of which were aired in a
2 two-part report on May 11 and 12 of this year.
3 The Court is not going to detail the Sheriff's
4 comments further here, other than to note that
5 they related to the Sheriff's involvement with
6 Mr. Avery in the past, including the Sheriff's
7 role in the prosecution of Mr. Avery back in
8 1985, relating to a sex assault charge, for which
9 he was subsequently exonerated. The Sheriff also
10 relayed in the report some of his own opinions

11 concerning the defendant's personality.

12 The defendant contends that he is
13 entitled to the remedy he seeks because the
14 Sheriff's's comments were calculated to interfere
15 with the defendant's right to a fair trial in
16 Manitowoc County, before a Manitowoc County jury.

17 The Court has reviewed the two-part news
18 report in its entirety and I have also read and
19 heard the party's arguments; that is, the written
20 argument submitted by Mr. Strang with his motion;
21 the written response submitted by Mr. Fallon; as
22 well as the arguments made at the July 5, 2006
23 hearing. The Court makes the following
24 observations:

25 The Court has accepted, today, the

1 stipulation of the parties that the trial will be
2 held in Calumet County, with a Manitowoc County
3 jury. So the defendant has not lost his
4 constitutional right to a trial in the county

5 where the crimes are alleged to have been
6 committed. The place of the trial is being moved
7 at the joint request of the defendant and the
8 State.

9 Earlier in these proceedings, the
10 parties agreed, informally, to eliminate out of
11 court comments to the press; the State, through
12 the attorneys or representatives of the Calumet
13 County Sheriff's Department, and the defense
14 through defense counsel or the defendant himself.
15 There was, and is, no order at this time to
16 support this agreement. But it came about as a
17 result of the Court's reluctance to issue a gag
18 order, which the Court regarded as an extreme
19 remedy. The Court felt that this agreement,
20 along with the admonition to the parties to
21 comply with Supreme Court Rule 20:3.6, would
22 address the concerns initially raised by the
23 defense.

24 The informal agreement has proven
25 largely effective with respect to the parties

1 involved. No party mentioned any concern at the
2 time with comments originating from the Manitowoc
3 County Sheriff's Department. The Court did not
4 issue any type of gag order, and the Sheriff's
5 comments in this case did not violate any such
6 order.

7 There is no evidence that the Sheriff
8 initiated contact with FOX 11 News.
9 Representatives of that organization apparently
10 contacted him for the interview.

11 Nevertheless, the Court does believe
12 that the comments were inappropriate coming in
13 the context of these court proceedings. And the
14 Sheriff should not have -- should have used his
15 own discretion to avoid such comments. Those
16 comments fell within the scope of the type of
17 publicity the parties had agreed to stop and had
18 the potential to jeopardize the defendant's right
19 to a jury of Manitowoc County jurors.

20 Whatever the Court's decision is on the
21 defense motion, the Court believes that care
22 should be taken to make sure such comments do not
23 occur again before the trial in this case. The
24 Court notes that the comments involved were those

25 of the Sheriff alone.

23

1 His department does not have control of
2 this investigation. And the Court has not been
3 presented with any evidence to suggest that any
4 other member of the Manitowoc County Sheriff's
5 Department who participated in the investigation
6 in this case has been directly, or indirectly,
7 influenced in any way by the Sheriff. The Court
8 notes that the Sheriff has announced his
9 intention to retire at the expiration of his term
10 in early January of next year.

11 The Court makes the following
12 conclusions: The Court is unaware of any
13 precedent for granting the remedies the defendant
14 seeks where no court order was violated. The
15 cases cited by the defense, which sustain the
16 drastic remedy of exclusion of evidence, involve
17 violation of either a court order or a discovery
18 statute.

19 Participation by representatives of the
20 State in pre-trial publicity has only been used
21 in reported cases as a grounds for change of
22 venue or a continuance. There is even less
23 reason in this case to exclude evidence from
24 members of the Sheriff's Department who did not
25 themselves participate in any allegedly improper

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1 comments.

2 The Court further notes that the report
3 was a one time, in two-part, news item on one
4 television station in May, approximately nine
5 months before what will now be the scheduled
6 start of the trial.

7 The Court agrees that the comments made
8 were inappropriate in the context of these court
9 proceedings and did constitute a threat to the
10 defendant's right to fair trial before a
11 Manitowoc County jury; although, the Court has
12 earlier today accepted a stipulation of the
13 parties to have this case heard by a Manitowoc

14 County jury.

15 While the attorneys did not cite concern
16 over comments from the County Sheriff's
17 Department, that is, the Manitowoc County
18 Sheriff's Department, at the time they reached
19 their informal agreement to refrain from public
20 comment in this case, the comments should not
21 have been made.

22 To make sure there are no further
23 problems of this nature, the Court is going to
24 issue an order prohibiting members of either the
25 Manitowoc County Sheriff's Department, or the

25

1 Calumet County Sheriff's Department, from making
2 any further public comment concerning this case,
3 or the defendant, Steven Avery, until the trial
4 is concluded.

5 The Court is satisfied that adherence to
6 the attorneys to Supreme Court Rule 20:3.6
7 precludes the need for any such order to apply to

8 counsel. I'm directing the counsel for the
9 defense to draft the order and submit it to
10 counsel for the State before submitting it to the
11 Court for signature.

12 Because the Court concludes that the
13 other remedy sought by the defense, that is, the
14 exclusion of testimony by members of the
15 Sheriff's Department of Manitowoc County is not
16 warranted, that portion of the defense motion is
17 denied.

18 ATTORNEY STRANG: As a matter of
19 clarification, your Honor -- and I'm happy to
draft
20 the proposed order -- I will intend to include
21 proceedings related to Brendan Dassey within the
22 Court's definition of this case, even though,
23 technically, the Dassey proceedings are under a
case
24 number different than the Avery proceedings.

25 THE COURT: Any objection from the
State?

1 ATTORNEY KRATZ: I'm not sure you have
2 authority over the Brendan Dassey case, Judge.
3 THE COURT: I don't have authority over
the
4 case, but -- and the Court's order would have no
5 affect in his case -- but I think it could extend
to
6 comments relating to his role in this case. I
7 will -- I will do this, I will let it up to the
8 parties, in the form of your proposed order, to
9 attempt to resolve that matter. If it still
winds
10 up being contested and the parties have
alternative
11 versions of the proposed order to submit, I will
12 review them, give the parties a chance to be
heard,
13 before I issue the Court's order.
14 ATTORNEY KRATZ: That's fine. Thank
you.
15 THE COURT: The Court will next move on
to
16 the State's motion in this case to admit
statements
17 of Teresa Halbach to co-workers. The State seeks
to
18 admit certain statements which Teresa Halbach
19 allegedly made to co-workers in October of 2005,
20 relating to her observations during an earlier
visit

21 to the defendant's property and her state of mind
22 based on those observations.

23 The defense opposes the admission of
24 these statements. The admissibility of evidence
25 which the State seeks to introduce involves

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1 issues relating to hearsay, relevance, and the
2 defendant's right to confront his accusers. The
3 Court will address each of these issues
4 independently, as they relate to the statements
5 which the State seeks to introduce.

6 First of all, with respect to hearsay,
7 the State asserts that Teresa Halbach's
8 statements relating to both her perceived
9 observations and to her state of mind fall under
10 the hearsay exception contained in Section
11 908.045 (2). That statute provides in relevant
12 part as follows:

13 The following are not excluded by the
14 hearsay rule, if the declarant is unavailable as
15 a witness. A statement which describes an event

16 or condition recently perceived by the declarant,
17 not in contemplation of pending or anticipated
18 litigation and while the declarant's recollection
19 was clear.

20 The statements which Teresa Halbach may
21 have made to her co-workers describing
22 observations from her earlier visit to the
23 defendant's home could fit within this hearsay
24 exception, subject to adequate foundation. At
25 this point, the State has not provided the Court

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1 with a date the observations were allegedly made
2 by Ms Halbach, nor when the observations were
3 relayed to her co-workers.

4 However, it appears that any statement
5 relating to her observations may well constitute
6 a statement which describes an event she recently
7 perceived. Indeed, the defense does not
8 seriously dispute, that with proper foundation,
9 the hearsay exception in Section 908.045 (2)

10 could apply to statements relating to Ms
11 Halbach's observations.

12 The statements relating to her state of
13 mind, as opposed to her observations, do not fall
14 within the exception of Section 908.045 (2). A
15 statement of recent perception is exactly that,
16 it is a statement of something which the
17 declarant has perceived. It does not include
18 opinions of the declarant relating to her
19 perceptions or her state of mind.

20 Now, there is a hearsay exception not
21 advanced by the State which could arguably apply
22 to the defendant's state of mind; that is,
23 Section 908.03 (1), which reads, in relevant
24 part, as follows. The following are not excluded
25 by the hearsay rule: A statement explaining an

1 event or condition made while the declarant was
2 perceiving the event or condition, or immediately
3 thereafter. While the statements made by Ms
4 Halbach relating to her then existing state of

5 mind could arguably fall within this exception,
6 they would still have to be relevant before they
7 could be admitted.

8 In order for a statement of Teresa
9 Halbach relating to her state of mind to be
10 relevant, the statement would have to relate to
11 an element of the crimes which the State seeks to
12 prove. A similar issue was addressed by the
13 Court of Appeals in the case of State vs. Kutz, a
14 2003 Court of Appeals case.

15 The defendant in that case was charged
16 with first-degree intentional homicide, hiding a
17 corpse, and stalking, arising out of the
18 disappearance of his wife. The State sought to
19 introduce a number of statements attributed to
20 the wife, in the time leading up to her
21 disappearance involving threats, which the
22 defendant made to her. The State sought
23 introduction of the of statements as evidence of
24 her fearful state of mind at the time she made
25 the statements, shortly before her disappearance.

1 The Court of Appeals ruled that the
2 statements were not admissible, because while
3 they were evidence of the declarant's state of
4 mind, her state of mind was not relevant to the
5 charges in that case. The Court recognized that
6 the primary purpose of introducing the evidence
7 was to demonstrate that the threats were actually
8 made to the wife, not that she was in fear
9 because of the statements.

10 That is similar to the situation here.
11 While any statement of Teresa Halbach involving
12 her state of mind made a few weeks before her
13 disappearance would certainly be relevance as
14 evidence of her state of mind, her state of mind
15 is not really at issue in this case.

16 The State has suggested that her state
17 of mind has a relationship to the elements which
18 the State must prove on the kidnapping charge.
19 However, the Court views the probative value of
20 her state of mind weeks before the crime as very
21 marginal. The Court does not believe that her
22 state of mind has sufficient probative value or
23 relevance to justify admission of the evidence.

24 The State asserts that the personal
25 observations of Theresa Halbach, as opposed to

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1 her state of mind, have relevance as to the
2 defendant's intent and plan to sexually assault
3 her in the future. The Court has heard
4 references in prior arguments of the parties to
5 allegations that Mr. Avery specifically requested
6 Teresa Halbach to return to his residence.

7 Depending on what other facts are
8 introduced, her observations, which were relayed
9 to her co-workers, may have probative value which
10 could justify their admission. However, the
11 Court is unable, based on the current state of
12 the record, to resolve that issue at this time.

13 Should the observations of Teresa
14 Halbach fall within the hearsay exception of
15 Section 908.045 (2) and have sufficient probative
16 value to justify their admission, the question
17 remains as to whether the admission of such
18 statements would violate the defendant's

19 constitutional rights under the confrontation
20 clause of the constitution.

21 The United States Supreme Court expanded
22 the scope of the confrontation clause in Crawford
23 vs. Washington, a 2004 case. The Court ruled in
24 Crawford that where testimonial statements are
25 involved, the defendant is entitled to confront

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1 his accusers, regardless of the reliability of
2 the statements or whether they fall in firmly
3 rooted hearsay exceptions.

4 For purposes of the State's motion, the
5 key question is whether the statements offered
6 for admission are testimonial in nature. The
7 issue of what is a testimonial statement was
8 recently addressed by the United States Supreme
9 Court in Davis vs. Washington, a case decided on
10 June 19th of this year. The case involved the
11 question of whether statements made by an
12 emergency 911 caller were testimonial in nature.

13 The Court ruled that some of the
14 statements made in the course of a 911 call were
15 testimonial, while others were not.

16 Specifically, the Court ruled as follows:

17 Statements are non-testimonial when made
18 in the course of police interrogation, under
19 circumstances objectively indicating that the
20 primary purpose of the interrogation is to enable
21 police assistance to meet an ongoing emergency.

22 They are testimonial when the
23 circumstances objectively indicate that there is
24 no such ongoing emergency and that the primary
25 purpose of the interrogation is to establish or

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1 prove past events potentially relevant to later
2 criminal prosecution.

3 Of particular significance to our case
4 is the following language, which the Davis
5 opinion quoted from the Crawford case: An
6 accuser who makes a formal statement to
7 government officers bears testimony, in a sense

8 that a person who makes a casual remark to an
9 acquaintance does not.

10 With this example the Supreme Court
11 comes very close to describing the statements
12 Teresa Halbach purportedly made to her co-workers
13 as a textbook example of what is not testimonial.
14 The observational statements which the State
15 seeks to admit were not made to the police and
16 were certainly not made in the context of any
17 investigation by anyone. They are much more in
18 the nature of a casual remark to an acquaintance,
19 which is not testimonial.

20 The Court concludes that the statements
21 by Teresa Halbach of her earlier observations of
22 Mr. Avery are not testimonial in nature and their
23 admission would not implicate confrontation
24 clause concerns.

25 In conclusion, any statement made by

1 Teresa Halbach to her co-workers concerning her

2 state of mind at an earlier point in time are not
3 admissible. Subject to proper foundation
4 establishing relevance and probative value,
5 statements that she made involving prior
6 observations may be admissible under the hearsay
7 exception contained in Section 908.045 (2).

8 Finally, for today's hearing, the Court
9 will address the defendant's motion challenging
10 the search of November 5, on the basis that it
11 violated the rule in Franks vs. Delaware. I'm
12 not addressing, today, the additional challenge
13 to the search based on alleged multiple
14 executions of the search warrant, because the
15 Court has not yet received from -- the briefs of
16 the parties on that issue.

17 As part of his challenge to obtaining --
18 to the obtaining and execution of the search
19 warrants, the defendant challenges the
20 November 5, 2005 search warrant on the basis that
21 it was obtained as a result of false statements,
22 knowingly and intentionally made, or with
23 reckless disregard for the truth, that were
24 included in the affidavit supporting the search
25 warrant request.

1 Under the rule of *Franks vs. Delaware*, a
2 1978 United States Supreme Court decision, if the
3 defendant makes a substantial preliminary
4 showing, and proves that such false statements
5 were made, and that they are necessary to the
6 finding of probable cause, a search warrant can
7 be voided and the fruits of the search
8 suppressed.

9 Initially, the defendant's motion
10 alleged that three separate knowingly false
11 statements were made in the affidavit of
12 Detective Mark Wiegert supporting the request for
13 the November 5, 2005 warrant. First, the
14 defendant alleged that Pamela Sturm and her
15 daughter, the two citizens who initially located
16 Teresa Halbach's vehicle on the Avery property,
17 were incorrectly characterized as volunteer
18 searchers, when in fact they were acting on
19 behalf of law enforcement.

20 Following the evidentiary hearing,
21 defense counsel acknowledged that the evidence

22 did not demonstrate that Ms Sturm and her
23 daughter were anything but volunteer searchers.
24 The motion goes on to allege, however, that the
25 affidavit falsely claimed that the volunteer

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1 searchers located a vehicle matching the
2 description of the vehicle owned by Teresa
3 Halbach, at the Avery Auto Salvage.

4 Further, the defendant alleges that the
5 affidavit falsely represented that the searchers
6 provided a complete VIN from the vehicle, when in
7 fact the searchers were only able to identify 10
8 of the 17 characters of the vehicle
9 identification number.

10 While acknowledging that Detective
11 Remiker was able to obtain the full VIN of the
12 vehicle when he responded to the scene, the
13 defendant's motion further alleges that Detective
14 Remiker did not have a search warrant, or consent
15 to be on the property, and his complete

16 identification of the VIN can, therefore, not be
17 considered because it was illegally obtained.
18 The defendant concludes that if the false
19 information and Detective Remiker's
20 identification are excised from the affidavit, it
21 lacks the required level of probable cause to
22 justify the issuance of the November 5 warrant.

23 The State asks the Court to deny the
24 motion for the following reasons: First, the
25 allegations made in the defendant's motion do not

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1 constitute a substantial preliminary showing
2 justifying an evidentiary hearing under the
3 holding of the Franks case.

4 Second, that Steven Avery lacks standing
5 to challenge the searches of any portions of the
6 Avery Auto Salvage Yard, other than his trailer
7 residence and the detached garage, because he has
8 not demonstrated a reasonable expectation of
9 privacy in the other portions of the Avery
10 Salvage property.

11 Third, that no intentional
12 misrepresentations were made in the affidavit.

13 Fourth, even if the challenged
14 information is excised from the affidavit, it
15 still contains sufficient probable cause to
16 justify the issuance of the November 5 warrant.

17 And, finally, that Steven Avery lacks
18 standing to challenge the information gathered by
19 Detective Remiker when the detective responded to
20 the scene on November 5, because whether or not
21 Detective Remiker was legally on the premises,
22 Mr. Avery had no reasonable expectation of
23 privacy, either in Teresa Halbach's vehicle, or
24 the portion of the Avery Salvage property on
25 which Detective Remiker was present.

1 The Court will first address the State's
2 claim that the defendant has not made a
3 substantial preliminary showing entitling him to
4 a hearing on the alleged Franks violations. When

5 a defendant alleges that a search warrant is
6 based on knowingly false information, the United
7 States Supreme Court held in *Franks vs. Delaware*
8 that the following procedure governs:

9 Where the defendant makes a substantial
10 preliminary showing that a false statement
11 knowingly and intentionally, or with reckless
12 disregard for the truth, was included by the
13 affiant in the warrant affidavit, and if the
14 allegedly false statement is necessary to the
15 finding of probable cause, the Fourth Amendment
16 requires that a hearing be held at the
17 defendant's request.

18 In the event that at the hearing the
19 allegation of perjury, or reckless disregard, is
20 established by the defendant, by a preponderance
21 of the evidence, and with the evidence -- with
22 the affidavits false material set to one side,
23 the affidavit's remaining content is insufficient
24 to establish probable cause, the search warrant
25 must be voided and the fruits of the search

1 excluded to the same extent as if probable cause
2 was lacking on the face of the affidavit.

3 In this case the defendant's motion
4 alleged, first, that the two citizens who found
5 the RAV-4 were not truly volunteer searchers, but
6 persons who Detective Wiegert told Detective
7 Remiker were willing to go to the Avery property
8 on Avery road to search the junkyard salvage
9 area.

10 The quoted language presumably was
11 obtained by the defendant as part of a discovery
12 from a police report. One possible inference
13 from the language could have been that the
14 volunteer searchers had in fact met with
15 Detective Wiegert and expressed their willingness
16 to assist the police in searching the Avery
17 property.

18 While neither party has argued the point
19 at any length, it is at least arguable that if
20 they had been enlisted to assist law enforcement,
21 the searchers may have had to disclose that fact
22 to Earl Avery when they obtained his consent to
23 enter the property, in order to conduct the
24 search. The State has not argued otherwise as a

25 reason for which the motion should be denied.

40

1 The defense also characterizes as an
2 intentional false statement, or one made with
3 reckless disregard for the truth, the assertion
4 in the affidavit that the searchers claimed they
5 had located a vehicle matching the description of
6 the vehicle owned by Teresa Halbach. The basis
7 for this assertion is that Pamela Sturm was told
8 to be looking for a green vehicle, but she
9 informed police that the vehicle was, quote,
10 "bluish green, though it's more blue than green",
11 end quote.

12 In addition, while the affidavit
13 indicates that Sturm provided the entire 17
14 character VIN, Sturm was actually able to report
15 only 9 or 10 of the 17 VIN characters. She was
16 not in a position to see the remaining
17 characters.

18 Detective Wiegert acknowledged in his

19 testimony that the portion of his affidavit
20 indicating that Patricia (sic) Sturm provided the
21 entire VIN, was incorrect. He acknowledged that
22 while he obtained the full VIN from Detective
23 Remiker, Ms Sturm was only able to make out 10 of
24 the 17 characters.

25 In addition to the inconsistencies

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1 listed in the defendant's motion, the defendant
2 also asserts that the State was not assisted by
3 Detective Remiker's ability to read the full VIN
4 because he did not have authorization or consent
5 to be on the property.

6 The Court was initially inclined to
7 conclude that the defendant's motion did
8 constitute a substantial preliminary showing that
9 false statements had been intentionally included
10 in the search warrant which called into question
11 the level of probable cause needed for the
12 issuance of a warrant. Had Patricia Sturm -- or
13 I believe it's Pamela Sturm -- and her daughter

14 been acting as agents of the State, their
15 discovery of the RAV-4 and it's identifying
16 information, which formed an important basis for
17 the issuance of the warrant, may have been
18 subject to suppression.

19 As the State correctly points out,
20 however, a close reading of the defendant's
21 motion reveals no substantial preliminary showing
22 that the Sturms were acting as agents of law
23 enforcement. The motion does refer to a
24 scheduled meeting of volunteers, which apparently
25 never took place.

1 But there is no assertion that the
2 Sturms had any specific relationship with any
3 member of law enforcement. Indeed, the defense
4 conceded at the conclusion of the hearing that no
5 evidence introduced added anything to the
6 allegations in the original motion.

7 In addition, while the motion describes

8 Detective Remiker's entry on the property as
9 unauthorized and non-consensual, which apparently
10 it was, there's no assertion in the motion that
11 Steven Avery had any legitimate expectation of
12 privacy over either Teresa Halbach's vehicle or
13 the portion of the Avery salvage property on
14 which the vehicle was located.

15 If Detective Remiker's presence on the
16 property had violated Steven Avery's reasonable
17 expectation of privacy, it could perhaps be
18 argued that the failure of the affidavit to
19 disclose his unlawful presence was a material an
20 intentional omission, which could support a
21 Franks claim under the Wisconsin Supreme Court
22 decision in State vs. Mann.

23 However, since there was no assertion in
24 the motion that the defendant had a legitimate
25 expectation of privacy over the area in which the

1 Halbach vehicle was located, Detective Remiker's
2 lack of permission to be on the property does not

3 measurably contribute to the substantial
4 preliminary showing required as a prerequisite
5 for a hearing on the defendant's Franks motion.

6 The Court concludes that the State is
7 correct, the motion does not make a substantial
8 preliminary showing entitling the defendant to a
9 hearing on the Franks claim. While the defendant
10 may not have been entitled to a hearing on his
11 Franks motion, the Court, nevertheless,
12 conditionally granted one.

13 The evidence introduced at the hearing
14 further supports the conclusion that there was no
15 Franks violation in this case. The defense
16 acknowledges that the volunteer searchers
17 referred to in Detective Wiegert's affidavit
18 truly were volunteer searchers; thus, there is no
19 basis upon which to delete their discovery of
20 Teresa Halbach's vehicle from the Wiegert
21 affidavit.

22 While one can argue whether or not
23 Detective Wiegert was justified in using the term
24 "matching" in the affidavit, the Sturm's clearly
25 did discover a vehicle, which was very similar in

1 appearance to Teresa Halbach's vehicle, and which
2 turned out to be an exact match.

3 While Detective Remiker's entry on the
4 property may not have been authorized by an owner
5 or person in control of the property, there is no
6 evidence to suggest that the defendant had any
7 ownership interest or other expectation in the
8 area upon which the vehicle was located, or the
9 vehicle itself. Thus, the information provided
10 by Detective Remiker is also appropriately
11 included in the affidavit.

12 With all of this information included,
13 there is no question but that the affidavit was
14 sufficient to justify the issuance of the
15 November 5, 2005 search warrant.

16 The State also asserts in its written
17 argument that Steven Avery has no standing to
18 challenge any of the searches that were
19 subsequently conducted at the Avery Auto Salvage
20 Yard, including searches of the burn barrel, burn
21 pit, the RAV-4, or any of the other buildings

22 located on the property, with the exception of
23 Mr. Avery's residence and detached garage.

24 Resolution of this argument is not
25 necessary to the Court's decision on the Franks

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1 issue. The Court concludes that this argument is
2 more appropriately addressed in the portion of
3 the defense motion challenging the multiple
4 executions of the original search warrant.

5 For the reasons stated, the defense
6 motion to suppress the fruits of the November 5,
7 2005 search warrant on the grounds that it was
8 issued in violation of Franks v. Delaware is
9 denied.

10 Those are all the decisions on motions
11 the Court has today. I did want to take a brief
12 inventory of what I understand to be the
13 outstanding motions and confirm the status of
14 those motions at this time.

15 The State has filed a motion concerning
16 the admissibility of DNA evidence. And it's my

17 understanding that at least at one point the
18 parties were working on a stipulation to resolve
19 that motion. Counsel, where are we on that
20 motion?

21 ATTORNEY KRATZ: I understood, Judge, if
22 there was going to be a challenge to whatever it
was
23 that Mr. Gahn had presented, that Mr. Buting was
24 going to alert us to that.

25 ATTORNEY BUTING: That's correct, Judge,

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1 and Mr. Gahn has been trying to compile some
2 additional requests that I had made regarding
those
3 tests and has not yet complied with that. And
once
4 we receive that, I anticipate we'll either --
we'll
5 be in a position to either agree or not agree.

6 THE COURT: All right. I would like to
7 have a date by which the Court will be notified
8 either that the motion is going to be contested,
or

9 that it's resolved.

10 ATTORNEY KRATZ: Judge, would the Court
be

11 willing to adopt a scheduling plan that Mr.
Buting

12 has 30 days after the receipt of our discovery?
13 Mr. Gahn is meeting with Mr. Fallon and myself
14 tomorrow. We should have an idea as to that
date,

15 certainly won't be any later than perhaps
16 mid-September. Nonetheless, Judge, Mr. Buting
17 believes that he can have that done within 30
days

18 after receipt.

19 THE COURT: When you say receipt, is
that

20 what's going to happen in the next couple of
days?

21 ATTORNEY KRATZ: No, Mr. Gahn will be
22 meeting with us. And what I'm suggesting is that
we

23 can -- if you wanted to set a date certain for
that,

24 we can have that to him, let's say by the 15th of
25 September; Mr. Buting alerting the Court as to
any

give

1 challenges by the 15th of October. That should
2 us plenty of time.

the

3 THE COURT: All right. So, Mr. Buting,
4 with the understanding that you are going to get
5 information by September 15th, the October 15th
6 acceptable to the defense?

is

7 ATTORNEY BUTING: Yes, that's fine.

filed

8 THE COURT: Very well. The State has
9 a number of other acts motions. The Court has
10 received written arguments and I'm going to be
11 issuing a written decision on those motions. Do

I

filed?

12 have all of the briefs that are going to be

from

13 ATTORNEY KRATZ: Yes, you have three
14 the State, Judge.

15 THE COURT: Mr. Strang.

the

16 ATTORNEY STRANG: You have everything
17 defense anticipates submitting.

18 THE COURT: Okay.

19 ATTORNEY STRANG: I think the most

recent

one 20 was Friday, August 18. We submitted a brief on

21 aspect of Paragraph 6 of the State's motion.

has 22 THE COURT: All right. And I understand
23 that each party has filed a motion. The defense

24 filed a motion to admit evidence regarding the

25 defendant's prior wrongful conviction. The State

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1 has filed a motion to exclude it. Where are the
2 parties on those motions?

stipulation 3 ATTORNEY KRATZ: I note that a

4 was proposed, Judge. I think even Mr. Strang may

5 have provided us with his first suggestion as to

6 that stipulation. This kind of goes on the same

7 track as the stipulation regarding evidence of

exchanged 8 victim history. That stipulation is to be

and 9 as well. Would the Court allow us to exchange

of 10 then perhaps alert the Court by, again, the 15th

we 11 October, if we have a resolution. If we don't,
12 can certainly tell the Court before that time.
13 THE COURT: Does that work for both
14 parties?
15 ATTORNEY STRANG: Yes. I followed the
on 16 Court's lead, I submitted a proposed stipulation
17 the wrongful conviction evidence that really also
18 looks like an offer of proof. It's fairly
detailed 19 and I gave the State a written draft of that
20 document either on August 9 or August 10, when we
21 were last here in Court. I don't -- I don't see
any 22 difficulty in leaving that issue unresolved until
23 October 15 on the present schedule.
24 THE COURT: All right. So with respect
to 25 that issue and the issue of the victim's history,

1 the parties will notify the Court by October 15th
2 either that you have an agreement, or that you

3 don't, and if it requires Court resolution --

4 ATTORNEY KRATZ: I'm sorry, we should

5 probably be using the 16th, the 15th is a Sunday.

6 THE COURT: All right. The 16th.

7 ATTORNEY KRATZ: I don't know if it

makes 8 that much difference. The 16th I think is --

9 THE COURT: I will use that for the DNA

10 evidence issue as well.

11 ATTORNEY STRANG: Okay.

12 THE COURT: With respect to the

suppression 13 motion regarding Marinette County statements, I

have 14 received briefs from both parties, but it's my

15 understanding that there may be a related issue

the 16 parties want to alert the Court to.

17 ATTORNEY FALLON: Yes, Judge. After

18 reviewing counsel's brief on the matter, the

thought 19 occurred to me that I think each counsel would

like 20 to be heard. If the Court for one reason or

another 21 decides to suppress the statement obtained by the

22 Marinette County Sheriff on Saturday, November

5th, 23 from the point on -- from the point of

contention,

24 we would like to be heard as to whether the
25 subsequent statements obtained on November 6th
ought

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1 to be suppressed as well. And that's because
2 there's a different set of arguments and issues
3 presented.

4 Neither party really briefed those this
5 time around, waiting and preferring to see if
6 there was a need to. So we -- I think each
7 counsel would reserve our right, if we may, to
8 address further those issues if, and only if, the
9 Court finds anything suppressible on the
10 November 5th statement.

11 THE COURT: Mr. Strang, is that a fair
12 statement?

13 ATTORNEY STRANG: That's been the
defense
14 intention from the start, both on the motion to
15 suppress statements after the point of
contention,

I 16 as Mr. Fallon puts it, on November 5, 2005. And
17 might add on the Fourth Amendment suppression
18 motions, as to which Mr. Buting took the lead
role,
19 I think the Court properly ought to decide on, is
20 the exclusionary right -- exclusionary role
rightly
21 invoked here? Does it have a role to play? If
it
22 does, we can be heard later, both parties, on the
23 scope of exclusion, or what potential evidence
would
24 derive from any unconstitutional conduct by law
25 enforcement.

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1 And I will add, it's not out of the
2 realm of possibility that the State or the
3 defense might wish to offer some evidence on the
4 scope of application in the exclusionary rule;
5 although, it's also quite possible that just
6 would be a matter of written or oral argument.
7 So not only am I in agreement with Mr. Fallon on

8 this point, it's really been my intention from
9 the start as I think a much more orderly and
10 measured way to proceed on those issues.

Whether 11 THE COURT: All right. So the --
make 12 or not the parties are going to be looking to
13 further argument, or possibly even introduce
14 additional evidence, will depend on the Court's
Court 15 decision. And the parties are both asking the
to 16 at this time to only make a decision with respect
summary? 17 the November 5 statements. Is that a fair

18 ATTORNEY FALLON: Yes.

is. 19 ATTORNEY STRANG: And there -- Yes, it

Court 20 And there, just to endorse the suggestion the
evidentiary 21 made during the August 9 and August 10
22 proceedings, there's no challenge to the
23 admissibility of Mr. Avery's statements on
24 November 5 prior to, again, as Mr. Fallon puts it
both 25 elegantly, the point of contention, and we have

1 briefed where exactly that arises in the recorded
2 interview.

3 THE COURT: All right. There is a
defense
4 motion, filed some time ago, entitled -- it's
5 actually not a motion, but a notice concerning
6 interference with right to counsel. I have been
led
7 to believe a number of times that's been
resolved,
8 but it's still technically hanging out there.

9 ATTORNEY STRANG: Well, it is resolved.
It
10 was not a motion or a request for relief, it was
a
11 notice of a concern. Since I had it -- had the
12 concern on June 16, I treated that deadline as
one
13 by which I ought to raise the concern in good
faith.
14 I did.

15 The State provided me the information it
16 promised about the inmate at issue, his name is
17 Orville Jacobs. I'm satisfied at this point with
18 the information I have gotten from the State. I
19 don't perceive a Sixth Amendment right to counsel

20 concern arising with respect to Mr. Jacobs. Of
21 course, if future information comes to light, or
22 future events warrant it, I will raise the
23 concern again, but I don't anticipate either of
24 those events coming to pass.

25 THE COURT: All right. Since it was

53

believe 1 entitled a notice and not a motion, I don't
or 2 there's any need for a formal withdrawal document
3 anything like that.

any 4 ATTORNEY STRANG: But neither is there
5 need for a ruling.

respect 6 THE COURT: All right. Then with
the 7 to the defense motion to suppress the fruits of
of 8 search, or searches, based on multiple executions
9 the search warrants, those written briefs are due
10 September 13.

11
simultaneous

ATTORNEY STRANG: Yes, it's a

12 exchange, as I understand it, of one round.

13
haven't

THE COURT: For my benefit, and I

14
to

seen the written arguments yet, but it appeared

15
in,

me possible, based on the way the evidence came

16
the

that there could be different lines of arguments

17 relating to different individual searches. Are

18 parties -- Are the briefs going to be structured

19 such that different searches are addressed

20 individually?

21
it

ATTORNEY BUTING: I suppose we could do

22
can

that way. I anticipate -- Really, if the Court

23 recall from the testimony, I anticipate that the

24
that

major point of contention is going to be after

25
night

first three hours or so search was made on the

was a 1 of the 5th, Saturday night. Thereafter, there
one 2 number of entries and -- and I can address each
issue 3 of those separately, but I think the primary
4 is going to be on that.

5 THE COURT: Let me just ask this, I
don't 6 want to tell each party -- either party how to
argue 7 their case, but if you have arguments that relate
to 8 some searches and not others, please let those be
9 differentiated in your briefs so that I know what
10 you are trying to argue.

11 ATTORNEY BUTING: Okay.

12 THE COURT: And then there's also a
State's 13 motion regarding statements to other inmates. I
14 believe I have recently received a written brief
15 from the defense on that. Is there anything more
16 coming from the State, or do I have everything
I'm 17 going to have on that?

18 ATTORNEY KRATZ: We just talked about
that, 19 Judge. We will discuss that in detail tomorrow
and 20 if the Court would allow us an opportunity,
perhaps

21 to the 13th of September, we can get that to the
22 Court as well.

23 THE COURT: All right. Any objection
from 24 the defense?

25 ATTORNEY STRANG: I don't. That's an
issue

55

1 that's under seal, or we have treated it as
sealed 2 to date.

3 THE COURT: Very well. I will give the
4 State until September 13 then to respond.

5 ATTORNEY BUTING: Judge, could we return
6 for just one moment to the multiple execution of
the 7 search warrant issue. As the Court framed it, I
8 don't know whether that -- the way these -- the
9 arguments may come out then might really be more
10 amenable to a reply by either party as well.

11 In the event that there are -- that the
12 State has certain arguments on certain searches

13 and not others, or that I have likewise, it might
14 be easier to just reply to them, rather than try
15 and anticipate -- each of us anticipate what the
16 arguments of the others would be. We have a
17 little bit more time to do that now and I just
18 raise that as one way of resolving that.

19 THE COURT: Mr. Fallon.

20 ATTORNEY FALLON: Yes. Thank you. It
21 seems to me that the way -- excuse me -- the way
the
22 defense pled the issue and proceeded with its
23 proofs, that the issue has been fairly well
narrowed
24 to complain of the searches occurring to Mr.
Avery's
25 trailer and garage, starting on Sunday, the 6th,

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obtained 1 until the second or subsequent warrant was

2 late afternoon, I believe on the 9th.

3 Those were the issues which were the
4 subject of the testimony and it seems to me that
5 that's the context in which the case is going to

6 be argued. So I'm not really sure that we need
7 to separate out the searches per se other than,
8 as the testimony reflected, there was, you know,
9 an entry on Sunday, for instance, and one or two
10 on Monday, and then one on Tuesday, that type of
11 itemization or reflection.

12 I'm not sure it's to our benefit to
13 separate them out any further, because as I
14 reviewed the case law in preparation for writing
15 this brief, it's not much -- it's not the issue,
16 really. And I don't -- I don't know if we really
17 need to reply, and counter-reply, or what have
18 you. It seems to me it's been narrowly pled and
19 the testimony was narrowly produced. So I'm not
20 sure we have a whole lot of range of other
21 searches at issue, so to speak.

22 THE COURT: Let's do this, after each
party
23 receives a copy of the other party's brief, if
24 either party feels there's a need to reply, you
can
25 ask the Court for permission, in writing, just
fax

1 it to me, I will take it up at that time.

2 ATTORNEY STRANG: Thank you.

3 THE COURT: I would ask also on that
issue,
4 I think I mentioned it before, I did not have
access
5 in our law library, or my online law library, to
all
6 of the secondary sources that necessarily relate
to
7 that issue. So if you have -- if you're going to
be
8 citing any secondary sources, please give me
copies.
9 I have got ALR and Am Jur and those types of
things,
10 but I think it was --

11 ATTORNEY BUTING: LaFave.

12 THE COURT: -- LaFave I do not have.
13 Right. I'm not looking to make the file any
bigger
14 than it is, but if you cite to LaFave, give me a
15 copy. I think I have already gotten one from the
16 State.

17 ATTORNEY FALLON: I think you got the
copy.
18 I think, unless counsel disagrees, I think we
have

Court. 19 got the relevant portions of LaFave for the
there 20 ATTORNEY BUTING: I believe so. If
21 are any -- so the Court has access to case law.
is 22 THE COURT: Other jurisdiction case law
23 fine, I have got LexisNexis, but LaFave is not on
24 there.
25 ATTORNEY BUTING: So anything like law

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that 1 journals, law reviews, things of those nature
2 might -- you do not have access to?
Lexis 3 THE COURT: If you have got access to
me. 4 and it's on Lexis, you don't have to send it to
5 ATTORNEY BUTING: I use Lexis.
6 THE COURT: Right. So, if it's not on
7 Lexis, send it, otherwise you don't have to. I
8 certainly have access to case law from all other
but 9 jurisdictions and a number of secondary sources,

10 not LaFave.

11 ATTORNEY FALLON: Your Honor, may I have
12 just a moment to talk to Mr. Buting on this.

13 THE COURT: Go ahead.

14 ATTORNEY FALLON: I thought we might
have
15 one other point of interest for the Court, but I
16 guess we'll have to defer comment until we
consider
17 it further.

18 THE COURT: All right. Is there
anything
19 further from either party today?

20 ATTORNEY STRANG: Yes. One, just a
point
21 of clarification. This may have been implicit in
22 the Court's rulings both on the motion to dismiss
23 and the motion for sanctions to exclude the
24 Manitowoc County Sheriff's Department, since the
25 Court referred to having reviewed the eight news

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1 conferences, but I just want to make sure that
the

2 record is complete and that, in fact, a viewable,
3 either VHS tape or DVD arrived from WFRV-TV to
the
4 Court as I had arranged to happen.

5 THE COURT: Yes, the VHS tape arrived
and
6 that's workable.

7 ATTORNEY STRANG: Terrific. Second, I
8 anticipate some further motions, not just motions
in
9 limine. Conceivably, for example, some discovery
10 that I received -- was received at my office, I
have
11 lost track of the dates now, but it's more than a
12 week and less than two weeks ago. Some new
13 discovery suggests a further non-evidentiary
motion.

14 It's also entirely possible, as
15 Mr. Dassey's case proceeds here, that an issue
16 may arise under Samuels -- under State vs.
17 Samuels in this case. We can't know that at this
18 juncture of the proceedings in Mr. Dassey's
19 separate case.

20 But what I would propose is that I treat
21 the October 16 deadline as a good time to file
22 any other motion, other than an in limine issue
23 properly addressed much closer to trial, you

24 know, that has arisen with new discovery, or new
25 information, or new events since June 16.

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1 For that matter, September 13, I also
2 could treat as a date for raising any new issues.
3 I know there's at least one that I intend to
4 raise so, that's disclosure. And I guess also
5 jointly request that the Court set a date, fix a
6 date for me to do that, or accommodate new issues
7 that have arisen.

8 THE COURT: Mr. Kratz.

9 ATTORNEY KRATZ: We are going to need a
10 scheduling conference anyway, Judge. We talked
11 about jury questionnaires. We talked about
exchange
12 of experts and some other more definite
scheduling
13 order from the Court. And whether the Court
wants
14 to do that by a phone conference, to at least
15 schedule that meeting, or wants to set that
meeting,
16 we're certainly amenable to that.

17 THE COURT: All right. Because of the
18 contemplated adjournment of the trial date, I
didn't
19 give that as much attention as I might have
before
20 today. I agree that we're going to need a
21 scheduling conference at some point to establish
22 timelines for filing motions in limine, jury
23 questionnaires, those types of things. Do either
of
24 the parties have any suggestions about when that
25 could be effectively accomplished?

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1 ATTORNEY STRANG: Well, we'll know where
we
2 are on some things on October 16, particularly
DNA,
3 and the wrongful conviction, and victim's history
4 information.

5 ATTORNEY KRATZ: Perhaps later that
week,
6 Judge, we know it's blocked off our calendar so.

7 THE COURT: I know I have got time that

8 week. All right. I'm having the clerk get me my
9 calendar.

10 ATTORNEY KRATZ: Could either be that
11 Thursday or Friday, those work best for us,
Judge.

12 THE COURT: Thursday the 19th, morning
or
13 afternoon?

14 ATTORNEY KRATZ: Morning would be just
15 fine.

16 THE COURT: Should we say 10:00.
17 ATTORNEY BUTING: That's fine.
18 ATTORNEY KRATZ: That's good, Judge.
Thank
19 you.

20 THE CLERK: What date was that?
21 THE COURT: October 19th.
22 ATTORNEY KRATZ: Will that be on the
record
23 or in chambers, your Honor?

24 THE COURT: I will notify you about that
a
25 little closer to the date, whether it will be on
the

1 record, or simply a scheduling conference, or
2 something that involves going on the record. For
3 now, it will be an off the record scheduling
4 conference, but I'm going to hold the time in the
5 event there is anything to deal with on the
record.

6 Does either party have anything else that needs
7 addressing?

8 ATTORNEY STRANG: So we'll address
9 deadlines for further motions and the whole sort
of
10 schedule before trial at that point?

11 THE COURT: Yes.

12 ATTORNEY STRANG: Fine.

13 THE COURT: Anything else today?

14 ATTORNEY KRATZ: No, Judge. Thank you.

15 THE COURT: If not, we're adjourned for
16 today.

17 (Proceedings concluded.)

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Diane Tesheneck, RPR
Official Court Reporter

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